

We said that we would give our reasons, mainly because of the difficulty caused by our decision in *Nanyang Development (1966) Sdn. Bhd. v. How Swee Poh*.⁽¹⁾ There we said that where a caveatee applies under section 327 of the National Land Code to the court for an order that a caveat on his land be removed it is up to the caveator to satisfy the court that he has good reasons for his alleged claim that he has a registrable interest in the land. But that case is different from this one. There the caveatee entered into an agreement to sell the land in question to A, who subsequently assigned her rights to B and the caveator came into the picture and caveated the land because he had a contract with C. There was no evidence showing that the caveator had any contract with the caveatee, nor with A, nor with B, and there was no evidence showing the connection between B and C. Here, on the other hand, there is a positive assertion that the appellant has agreed to sell the land to the respondent.

Secondly, in *Nanyang* at the material time the caveator had not filed nor undertaken to file a suit against the caveatee as defendant relating to the land. Here, on the other hand, there was and is a suit pending between caveator as plaintiff and caveatee as defendant relating to the disputed land.

The caveatee here is the registered proprietor. Ultimately it is up to the caveator to prove that he has good reasons for his alleged claim that he has a registrable interest in the land, but where he has filed a suit to vindicate his claim he does not have to prove he has a good claim when the caveatee applies to have the caveat removed, but only when the suit itself comes to trial.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Nahappan, Muthu & Peri.*

ISHAH BINTE AHMAD v. POH KIM DOI

[F.C. (Suffian L.P., Ali and Wan Suleiman FJJ.)
May 19, 1976]

[Alor Star — Federal Court Civil Appeal No. 166 of 1975]

Moneylenders — Loan of money — Memorandum of contract — Promissory note executed by way of security — Whether copy given to borrower need to be authenticated — Moneylenders Ordinance, 1951, ss. 16 and 27.

The respondent a licensed moneylender had brought an action for the recovery of the loan given to the appellant. A memorandum of the contract of loan had been signed by the respondent and thumbprinted by the appellant and at the same time the appellant executed a promissory note by way of security. A copy of the promissory note was given to the appellant but was not authenticated and it was contended by the appellant that as the copy was not authenticated, the loan was unenforceable. The learned trial judge held that the copy was not authenticated nor was the memorandum but he nevertheless held that the loan was enforceable. He therefore allowed the claim of the respondent. The appellant appealed to the Federal Court.

Held, dismissing the appeal: as there is no legal requirement in the Moneylenders Ordinance that the copy of the promissory note supplied by the lender to the borrower should be authenticated there was no merit in the appellant's contention in this case.

Case referred to:-

(1) *Karupiah v. Kehar Singh* [1965] 2 M.L.J. 58.

The following authorities were also cited in argument: *Nanyang Development (1966) Sdn. Bhd. v. How Swee Poh* [1970] 1 M.L.J. 145; *Selvadurai v. Chinniah* [1939] M.L.J. 254; *Lim Soh Meng v. Krishnan* [1967] 1 M.L.J. 8; *Ooi Ai Seng v. Chan Lin Lam* [1973] 2 M.L.J. 20; *Inter-continental Mining Sdn. Bhd. v. Societe des Etains de Bayas Tudjuh* [1974] 1 M.L.J. 145, 148 A to C; *Nasri v. Mesah* [1971] 1 M.L.J. 32.

FEDERAL COURT.

S. Visvanathan for the appellant.

Oo Gin Son for the respondent.

Suffian L.P. (delivering the judgment of the Court):

C The plaintiff (respondent before us) is a licensed moneylender. He lent money to the defendant (appellant before us).

That was on January 11, 1969. On that day both parties went to a solicitor, Mr. Christie. Before Mr. Christie the lender signed and the borrower thumbprinted a memorandum required by section 16 of the Moneylenders Ordinance, 1951. The copy produced by the plaintiff is Exhibit P1A at page 34 of the record.

At the same time the borrower executed a promissory note by way of security.

E According to the notes of the trial and to the written submission of the parties included in the appeal record, the contention of the borrower is a very narrow one. It is this. Two copies of the promissory note were executed. The plaintiff retained one copy (Exhibit P1 as at page 33) and gave the other copy (Exhibit D2 as at page 35) to the borrower. It is contended on behalf of the borrower that the copy given to him should have been authenticated by the lender, that it was not so authenticated and therefore the loan was not enforceable.

The learned judge held that the copy was not authenticated nor was the memorandum (Exhibit P1A at page 34), but nevertheless on the authority of *Karupiah v. Kehar Singh*⁽¹⁾ the loan was enforceable. He therefore allowed the claim.

G The borrower appealed to us.

During the course of arguments reference was made to sections 16 and 27 of the Ordinance and it would be convenient to reproduce them now.

Section 16 in so far as relevant provides:

H “(1) No contract for the repayment by a borrower of money lent to him by a moneylender and no security given by the borrower in respect of such contract shall be enforceable unless a note or memorandum in writing of the contract be signed by the parties to the contract, and unless a copy thereof authenticated by the lender be delivered to the borrower before the money is lent, and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed before the money was lent or before the security was given, as the case may be.”

I Subsection (3) prescribes what must be contained in the note or memorandum.

Section 27 in so far as relevant provides:

“(1) Whenever a promissory note is taken as security for any loan and the borrower is a person not understanding the written language on such note [as is the case here] the note shall be attested by an Advocate and Solicitor. The attessor

shall explain the terms of the promissory note to the borrower, and shall certify thereon that the borrower appeared to understand the meaning of the same. The money borrowed shall be paid over by the lender to the borrower in the presence of the attester who shall certify the fact upon the promissory note.

(2) Any promissory note required to be attested under this section and not so attested shall be void and the lender shall not be entitled to recover any loan for which due note is taken as security."

With all due respect to counsel for the borrower we cannot see anything in the above two sections requiring that the copy of the promissory note supplied by the lender to the borrower should be authenticated.

It is true that section 16(1) refers to security given by the borrower, but that provision deals principally with notes or memoranda of the contract for the repayment of the money lent. It says that there should be such a note or memorandum satisfying certain conditions prescribed by the subsection, without which neither the loan nor its security can be enforced, and it is that note or memorandum which must be authenticated. The subsection does not say that the security also must be authenticated.

The principal provision dealing with promissory notes is section 27, and that section nowhere says that a promissory note taken as security should be authenticated. All it says is that if the borrower does not understand what is written in the note, (1) it should be attested by a solicitor, (2) the solicitor should explain its contents, (3) the solicitor should certify on the note that the borrower appeared to understand its contents, (4) the money borrowed should be paid in the presence of the solicitor, and (5) the solicitor should so certify on the note.

As there is no legal requirement that the promissory note supplied by the lender to the borrower should be authenticated, there is in our view no merit in the borrower's contention.

In the course of his judgment the learned trial judge said that the memorandum prepared in accordance with section 16(1), Exhibit P1A at page 34, was not authenticated either. With all due respect we do not think that he should have dealt with this point at all, as the dispute referred by counsel to the court concerned authentication of the promissory note only, not of the memorandum under section 16(1).

With all due respect we would dismiss this appeal, with costs; the appellant's deposit to be paid to the respondent against his taxed costs.

Appeal dismissed.

Solicitors: Syarikat Visa; Oo Gin Sun, Bakar & Co.

A AH THIAN v. GOVERNMENT OF MALAYSIA

[F.C. (Suffian L.P.) May 28, 1976]

[Kuala Lumpur — Federal Court Criminal Application No. 3 of 1976]

Constitutional Law — Application to declare law invalid on ground of inconsistency with Constitution — Power may be exercised by any court — Leave of Federal Court not necessary — Federal Constitution, arts. 4, 8, 74 or 75.

Constitutional Law — Parliament — Doctrine of supremacy of — Whether applicable in Malaysia.

In this case the applicant had been charged with committing armed gang robbery under sections 392 and 397 of the Penal Code, an offence punishable under section 5 of the Firearms (Increased Penalties) Act, 1971 as amended. It was argued that the Firearms (Increased Penalties) (Amendment) Act, 1974 was *ultra vires* the Federal Constitution as it contravened Article 8(1) of the Constitution and was therefore void. An adjournment was obtained to enable the applicant to obtain the leave of a judge of the Federal Court to start proceedings for a declaration that the Act was void for the reason stated.

Held: as the argument of the applicant was that the Act was invalid because it was inconsistent with the Constitution, Clause (4) of Article 4 and Clause (1) of Article 128 of the Constitution did not apply and the point may be raised in the ordinary way in the course of submission and determined in the High Court, without reference to the Federal Court and there is no need for leave of a Judge of the Federal Court.

Case referred to:-

(1) *Ooi Ah Phua v. O.C.C.I.D. Kedah/Perlis* [1975] 2 M.L.J. 198.

FEDERAL COURT.

Karpal Singh for the applicant.

T.S. Nathan (Deputy Public Prosecutor) for the respondent.

Suffian L.P.: This application is before me in my capacity as a judge of the Federal Court.

The applicant was charged with committing armed robbery under sections 392 and 397 of the Penal Code, an offence punishable under section 5 of the Firearms (Increased Penalties) Act 37 of 1971 as amended.

If convicted he is liable to imprisonment for his natural life and with whipping with no less than six strokes.

Also charged with him was one Ooi Chooi Toh who figured in the case of *Ooi Ah Phua v. O.C.C.I.D. Kedah/Perlis*.⁽¹⁾

The applicant's counsel argued that the Firearms (Increased Penalties) Act 37 of 1971 as amended by the Firearms (Increased Penalties) (Amendment) Act A256 of 1974 is "*ultra vires* the Federal Constitution as it contravenes article 8(1) of the Constitution and is therefore void".

Article 8(1) reads —

"All persons are equal before the law and entitled to the equal protection of the law."

On March 30, 1976, at the close of the case for the prosecution, counsel for the applicant applied for an adjournment to enable him to obtain the leave of a judge of the Federal Court to start proceedings for a declaration that the Act is void for the reason already stated. The application was granted, hence this